S 413-11

100TH CONGRESS
1st Session

SENATE

REPORT
100-254

PROVIDING FOR THE SETTLEMENT OF WATER RIGHTS CLAIMS OF THE LA JOLLA, RINCON, SAN PASQUAL, PAUMA, AND PALA BANDS OF MISSION INDIANS IN SAN DIEGO COUNTY, CALIFORNIA, AND FOR OTHER PURPOSES

DECEMBER 11 (legislative day, DECEMBER 8), 1987.—Ordered to be printed

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Mr. INOUYE, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 795]

The Select Committee on Indian Affairs, to which was referred the bill (S. 795) to provide for the settlement of water rights claims of the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians in San Diego County, California, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE

S. 795 provides for the settlement of water rights claims of the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians in San Diego County, California, and provides that a sufficient amount of water be made available in the San Luis Rey River basin to satisfy the water needs of all water users.

BACKGROUND

The Mission Indian Bands were settled on five small reservations in the San Luis Rey River basin under the authority of the 1891 Mission Indian Relief Act. The San Luis Rey River, the principal source of surface water in the area, rises in the Coast Ranges of northern San Diego County and flows westward along all five Indian reservations into the Pacific Ocean. Through various actions of the Federal government pursuant to contracts with private entities or grants of rights of way over Indian lands for the diversion and transportation of water, there is currently an insufficient

supply of unappropriated water to satisfy the needs of all water users in the San Luis Rey River watershed.

A detailed description of the history of the situation that gave rise to this legislation can be found in Senate Report 100–47, filed by the Select Committee on Indian Affairs on April 27, 1987. On that same date, the report and the bill, S. 795, were referred to the Senate Committee on Energy and Natural Resources for a 30-day period. During its deliberations on the measure, the Energy Committee raised certain concerns that the two Committees' Chairmen and Ranking Members agreed would best be resolved by the Indian Affairs Committee. Thus, the bill was re-referred to the Indian Affairs Committee, which has now adopted the substitute bill that is the subject of this report.

PENDING LITIGATION

There are three cases currently pending in the U.S. District Court for the Southern District of California that have been consolidated into one proceeding, *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.,* in which the Bands, and the United States on their behalf as trustee, seek to have all the contracts and permits granting the Escondido Mutual Water Company and the Vista Irrigation District various rights-of-way and water rights appurtenant to the Mission Indians' land declared void, to adjudicate the Federal reserved water rights of the Bands, and to recover money damages from Escondido and Vista for their continuing use of water under allegedly invalid contracts beginning in 1894. Proceedings have been stayed pending the outcome of settlement negotiations among the parties and a potential legislative resolution of the outstanding claims.

In addition to the federal district court litigation, the parties to the settlement are also involved in a proceeding before the Federal Energy Regulatory Commission. The Bands and the United States intervened in the FERC proceedings in the early 1970s, with respect to Escondido's effort to renew its Federal power license, seeking to either have the new license issued to the United States, or to impose conditions on any new license issued to Escondido and Vista. This proceeding has been through extensive hearings before the Commission, through review by the Ninth Circuit Court of Appeals, and to the U.S. Supreme Court. The Supreme Court held that section (e) of the Federal Power Act, requires the Commission to accept without modification, conditions that the Secretary deems necessary for the adequate protection and utilization of the reservations. The Court remanded the case to the Ninth Circuit, which in turn remanded the matter to FERC, where it is currently pending.

PROPOSED SETTLEMENT

The settlement is predicated on two objectives: division of local water and the costs associated with its development and distribution among the Bands, Escondido, and Vista; and delivery of Federally-developed Central Valley Project water to the San Luis Rey River watershed, given the insufficiency of local supplies to meet the needs of the Indian and non-Indian communities.

Ninety percent of the locally available water is presently used by Vista and Escondido. The remaining ten percent is allocated for use by the Bands. Under the proposed settlement, local water would be shared equally, with a 50 percent allocation to the Bands, and the remainder to Vista and Escondido. Thus, the Bands will have the right to make beneficial use of approximately 9,000 acre feet of local water annually. In partial settlement of the Bands' claims in the pending litigation, in consideration of the use of the Bands' lands for project facilities, to the extent that the local water is surplus to the Bands' needs, Escondido and Vista have agreed to make payments to the Indian Water Authority based on the amount of local and imported water that the Bands do not use. For the first 7,000 acre feet of local water that the Indians do not use, Escondido and Vista will pay 90 percent of their cost of obtaining water from an alternative source. For any remaining unused local water Escondido and Vista will pay 80 percent of the cost associated with obtaining alternative source water. Escondido and Vista will also pay the Indian Water Authority all economic benefits they derive from purchasing all but 6,000 acre-feet per year of the CVP water provided by the bill.

To assure a reliable supply of local water in drought conditions, Escondido and Vista have agreed to guarantee the Bands a minimum of 7,000 acre feet of local water per year to the extent that it is needed for the reservations. Costs of operating, maintaining, and if necessary, replacing local distribution facilities will continue to be borne by Vista and Escondido, but the Bands will assume all costs associated with covering or placing underground the portion of the Escondido Canal that crosses the San Pasqual Reservation. The Bands, Escondido and Vista will share the costs of operating, maintaining, replacing, and further developing the Warner Ranch wellfield facilities, with pumping power costs for the wellfield to be shared equally (50 percent by the Bands) and the operation, maintenance and new capital development costs to be divided 40 percent to the Bands and 60 percent to Escondido and Vista.

Of the approximately one million acre feet of the Central Valley federal reclamation project water that is not currently under contract, S. 795 authorizes the delivery of 22,700 acre feet per year to the Mission Bands and the local entities, using existing facilities operated by the State of California, the Metropolitan Water District of Southern California, and the San Diego County Water Authority. The Bands and the local entities would assume all of the costs associated with the use of existing facilities to convey the Central Valley Project water from the Sacramento-San Joaquin Delta to northern San Diego County. No new facility construction is necessary. For the first 6,000 acre-feet per year of Central Valley Project water which the local entities purchase, they will pay the irrigation project use rate. For the remainder of the Central Valley Project water, the local entities and the Bands will pay the Federal government the operation and maintenance component of costs at the irrigation project use rate for Central Valley Project water, and the capital component will be assumed by the Federal government as a nonreimbursable cost of the Central Valley Project, reflecting a part of the Federal contribution to the settlement.

For the power required to transport the Central Valley Project water from the Sacramento-San Joaquin delta over the Tehachapi Mountains to the reservations and the local entities' service areas, the local entities will likewise pay the irrigation project use rate for the power required to pump 6,000 acre-feet per year. For the power required to pump the remainder of the water, the local entities and the Bands will assume the operation and maintenance component of costs associated with project use power; the capital component will be assumed by the Federal government as part of its contribution to the settlement. Given the present balance of available surplus power that would be used to satisfy the terms of the settlement, it is projected that there will be no impact on existing project use or commercial firm power customers receiving power under existing contracts. The bill includes provisions to assure that the contract rights of those customers are protected.

S. 795 authorizes the establishment of an Indian Water Authority. The authorty will manage the Bands' water and related financial resources, through investment and use for economic development of the Bands, the Bands' reservation lands, and their members. The authority is prohibited from using funds for per capita payments to members of any Band.

SUMMARY OF MAJOR CHANGES

S. 795 has been revised by the Select Committee on Indian Affairs to resolve concerns raised during consideration of the measure by the Energy and Natural Resources Committee. The concerns raised and the method of resolution are described as follows:

Lease and sale of water

The earlier reported bill allowed the Indian Water Authority to lease or sell the Bands' entitlement to San Luis Rey River water to the next junior users, the local entities, and to market water from the Central Valley Project to third parties. The Energy Committee expressed objections to those provisions. The bill has been revised to provide that Central Valley Project water will be delivered to the Bands and the local entities for their own use only, with no resale to third parties. Also, such local water as the Bands do not use will flow to the local entities, who are the next appropriators in priority on the San Luis Rey River, without any benefits that may be obtained from the Bands' priority. Based upon the amount of the Bands' share of water that the local entities use, the local entities will compensate the Bands for their claims as a whole, including the use of Reservation lands for project facilities. Additionally, the local entities will provide to the Bands a portion of the savings they realize from use of Central Valley Project water rather than water from alternative sources.

Federal Power Act applicability

The bill as originally reported included an exemption from FERC licensing. The Energy Committee objected to this exemption. The bill has been amended to retain FERC's customary jurisdiction; however, in future relicensing activities, FERC would be required to respect the terms of the settlement.

Resale of power

Clarifying amendments have been added to assure that the Central Valley Project power can be used only for pumping of the Central Valley Project water at state and Federal facilities and may not be resold.

Protection of existing preference power customers

Since the contribution of power needed to deliver water pursuant to the settlement agreement is being made to fulfill the United States' trust responsibility, the costs are not intended to fall upon existing Central Valley Project preference power customers. Amendments have been included to assure that the pumping power for the settlement will not come from the power generated from the Central Valley Project that would have been expected to be delivered to preference power customers pursuant to their existing contractual rights.

Protection of water users within the Central Valley project

New sections 6 and 7 have been added to the bill to protect the rights of water users within the existing Central Valley Project. Section 6 requries the United States to augment the existing CVP water supplies through conservation measures, participation in state or Army Corps of Engineers projects, or use of alternative supplies from another source to make up for the water provided to the Bands and local entities by the bill as soon as it appears that there is or is about to be a shortage of firm project water available for contracting to CVP users. Section 7 allows the CVP water and power provided by the bill to the Bands and local entities to be replaced at any time by water and power from another source. The implementation of proposals under both these sections is authorized only if the benefits to the parties are not diminished and the rights of other water and power users are not adversely affected. Implementation of proposals is further subject to Congressional review and the authorization and availability of necessary funds.

LEGISLATIVE HISTORY

99th Congress

S. 2676, a bill virtually identical to S. 795, was introduced in the 99th Congress and referred to the Select Committee on Indian Affairs with instructions that when reported, the bill be referred to the Committee on Energy and Natural Resources for a period of thirty calendar days. A joint hearing of the Select Committee on Indian Affairs and the Energy and Natural Resources Committee was held on S. 2676 on August 11, 1986. All parties to the settlement testified in support of enactment of S. 2676. The Select Committee on Indian Affairs favorably reported the measure on September 24, 1986, and the Energy Committee discharged the bill. However, final action was not possible prior to adjournment of the 99th Congress.

On December 16, 1985, Representative Ron Packard introduced H.R. 3958, a companion bill to S. 2676, which was referred to the Subcommittee on Water and Power Resources of the House Inte-

rior and Insular Affairs Committee which held hearings. The House took no other action in the 99th Congress.

100th Congress

S. 795 was introduced on March 19, 1987 by Senator Cranston, and was referred to the Select Committee on Indian Affairs. Congressman Packard introduced a companion bill to S. 795 (H.R. 1699) on March 18, 1987. H.R. 1699 was referred to the Water and Power Resources Subcommittee of the House Interior and Insular Affairs Committee. No further action on the bill has been taken in the House.

The Chairman and Ranking Minority Members of the Select Committee on Indian Affairs and the Energy and Natural Resources Committee sent a letter to Majority Leader Byrd and Minority Leader Dole on March 20, 1987 requesting the unanimous consent of the Senate that upon introduction, S. 795 be referred to the Select Committee on Indian Affairs with instructions that when reported, the bill be referred to the Committee on Energy and Natural Resources for a period not to exceed thirty calendar days (not including periods of seven or more days that the Senate is not in session). However, because the bill was referred only to the Select Committee on Indian Affairs with no subsequent action by the Parliamentarian, the two Chairmen and Ranking Minority Members renewed their request (April 3, 1987) that S. 795 be referred to the Committee on Energy and Natural Resources when the bill was reported by the Select Committee on Indian Affairs. Thus, the bill and report were referred to the Energy Committee on April 28, 1987, when the Indian Affairs Committee reported it to the full Senate.

Subsequently, by agreement of the leaders of both Committees, the bill was referred back to the Select Committee on Indian Affairs for further action. Upon submission of this report, which is the second report on the same bill from the Indian Affairs Committee (the first having been filed on April 28, 1987—see Senate Report 100–47), the bill will be sent again to the Committee on Energy and Natural Resources for thirty calendar days. The proposed revisions have been prepared with the advice and cooperation of the Energy Committee, where it is expected that the bill will be discharged without further amendment.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on November 5, 1987, with a quorum present, by a vote of seven ayes and one nay, recommends that the Senate pass S. 795, as amended.

SECTION-BY-SECTION ANALYSIS

Sec. 1. Titles the bill the "San Luis Rey Indian Water Rights Settlement Act".

Sec. 2. Defines what is meant in the bill by use of the terms: Bands, Central Valley Project, firm project water, Indian Water Authority, local entities, project use power, San Diego Aqueduct, and settlement agreement.

Sec. 3. (a) Congressional findings that:

(1) the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians on and near the San Luis Rey River are in need of a reliable source of water;

(2) diversions of River water have been an important source of supply for the local entities;

(3) the River is inadequate to meet the needs of both the Bands and the local entities, giving rise to litigation;

(4) the litigation has impaired economic development on the reservations, contributed to high unemployment, increased dependency of the Bands on the federal government, and impeded conservation and preservation of water resources;

(5) without a negotiated settlement, the 20-year-old litigation will continue for many years, the economy of the area and the reservations will continue to be adversely affected, and improved water conservation will be delayed;

(6) an agreement has been reached to settle the litigation that is fair and just to all parties;

(7) the parties have agreed to a settlement under which: (A) the right to use the water of the River will be shared equally by the Bands and the local entities, (B) the local entities guarantee 7,000 acre-feet annually to the Bands, (C) the local entities will contribute development, conveyance and storage benefits from the Henshaw Dam, the Escondido Canal and the Wohlford Dam and Reservoir, as well as the Warner Ranch wellfield facilities, with cost-sharing with the Bands on O&M and replacement of the latter facilities, (D) the local entities agree to make payments to the Bands based on their diversions of water which the Bands do not immediately need and to give the Bands the economic benefit they derive by using more than 6,000 acre-feet per year of Central Valley Project water, and (E) the Bands agree to pay costs of covering the Escondido Canal where it crosses the San Pasqual Reservation.

(b) The Act's purpose is to settle the Bands' reserved water rights in a manner that—

(1) provides a reliable supply of water to the Bands;

(2) promotes conservation of scarce River water;

(3) sets a basis for a partnership between the Bands and the local entities; and

(4) fosters an economic base for the Bands.

Sec. 4. Provides that sections 5, 6, 7, 8 and 10 of this Act will be effective when:

(1) all parties have entered into the settlement agreement;

(2) the Secretary determines that legal requirements are satisfied, including enactment of legislation and execution of necessary contracts; and

(3) stipulated judgments and other final court proceedings are entered.

Sec. 5. (a) Delivery of Water.

(1) Directs the Secretary to deliver to the Indian Water Authority and the local entities annually and in perpetuity, 22,700 acre-feet of firm project water, with the local entities to receive 6,000 acre-feet per year, plus such additional water as the Bands cannot use on their reservations. Subjects the 22,700 acre-feet of firm

project water to the 1902 Federal Reclamation Act, except that compliance with state laws that govern changes in places of use, purposes of use, or points of diversion, in water rights permits for the CVP shall not be required.

(2) Requires the Indian Water Authority and the local entities to: (A) reimburse the United States (i) at the irrigation project use rate for 6,000 acre-feet per year of water delivered to the lcoal entities, and (ii) for O&M costs incurred in delivery of the remaining water referred to in (1) at rates charged for Central Valley Project (CVP) irrigation water, any construction costs associated with providing such remaining water to be non-reimbursable; (B) pay all costs for conveying water through non-Federal facilities and all costs in connection with conveying water from the point of delivery in the Aqueduct to the Reservations and service areas.

(3) Provides that the Secretary is not obligated to deliver water if: (A) delivery requires new Federal construction; (B) consent for use of non-Federal facilities cannot be obtained; or (C) necessary contracts have not been executed or amended.

(4) Requires the Secretary to insure that water delivered under (a)(1) will not raise cost of water to CVP contractors.

(b) Use of Project Use Power for Pumping.

(1) Directs the Secretary to use project use power from CVP to deliver the water in (a)(1) from the Sacramento-San Joaquin Delta to the Indian Water Authority and the local entities. If CVP resources are not adequate, authorizes the Secretary of Energy to obtain additional power elsewhere until CVP project use power can be made available.

(2) Requires the Indian Water Authority and the local entities to reimburse the United States (A) at the irrigation project use rate for power used to deliver 6,000 acre-feet per year of the water to the local entities, and (B) for O&M costs at the project use rate for irrigation water for power used to deliver the remaining water, any construction costs associated with providing such power to be non-reimbursable.

(3) Requires the Secretary of Energy (A) to make power available for pumping only at state or Federal facilities, (B) not to utilize power that is needed for other project purposes and (C) to ensure that, until after December 31, 2004, for CVP preference power customers to the extent of any existing contract or obligation or for any additional period that may be covered by any existing contract or obligation, the same amount of power is available for sale to preference customers as would be without this Act. The intent of this paragraph is to clarify that the only power provided under the settlement is power needed to fulfill its purpose, (i.e. pumping of water) and that such power may not be reconveyed at all. The amendment also clarifies that the power resources which Central Valley Project preference customers may receive under existing contracts shall not be taken and used for the purposes of this Act. This includes not only the normal contract power entitlements but also any discretionary power that the Secretary of Energy may be able to make available for sale to existing preference users under contracts that are in force on the date of enactment of this Act. Insofar as Central Valley Project power resources are not available to accomplish the purposes of this Act, the Secretary of Energy

shall purchase the necessary power from other sources pursuant to paragraph (1).

(4) Requires both Secretaries to ensure that the provision of power under (1) will not mean added power costs either: (A) for project use purposes, or (B) until after December 31, 2004, to CVP preference customers to the extent of any existing contract or obligation, or for any additional period that may be covered by any existing contract or obligation, and that no added power costs incurred during the term of an existing contract or obligation may be accrued or passed on to CVP customers following the expiration of such contract or obligation.

(c) Authorizes both Secretaries to enter agreements as necessary to meeting obligations under this Act.

Sec. 6. Protection of Water Users within Existing Central Valley Project.

(a) Requires the Secretary of the Interior to take such measures as are necessary to assure that nothing in this Act diminishes the amount of firm project water available for contracting within the CVP service area as it existed on January 1, 1987, by augmenting the existing supply or obtaining an alternative supply by conservation or other measures if and when such measures become necessary. Requires that only water to which the State of California is entitled be used, and prohibits the use of any measure that would diminish the benefits provided to the Bands, Indian Water Authority, or local entities by this Act, or that would adversely affect the rights of other water or power users.

(b) Prohibits the Secretary of the Interior from implementing subsection (a) until he has submitted a report describing the proposed measures, alternatives, and costs to the House Committee on Interior and Insular Affairs and the Senate Indian Affairs and Energy and Natural Resources Committees, 90 calendar days have elapsed, and appropriations have been authorized and made available.

(c) Permits the obligations described in subsection (a) to be enforced in court by an action for declaratory or injunctive relief, specific performance, or damages.

(d) This Act does not authorize the construction of any new dams or water storage facilities.

Sec. 7. Option to Substitute Alternative Sources of Water and Power.

(a) Authorizes the Secretaries of the Interior and Energy to obtain water and power for the parties from any alternative sources so long as the benefits to the parties are not diminished and the rights of other water and power users are not adversely affected.

(b) Prohibits the Secretaries of the Interior and Energy from implementing subsection (a) until they have submitted a report describing the proposed measures, alternatives, and costs to the House Committee on Interior and Insular Affairs and the Senate Indian Affairs and Energy and Natural Resources Committees, 90 calendar days have elapsed, and appropriations have been authorized and made available.

Sec. 8. San Luis Rey Indian Water Authority.

(a)(1) Recognizes and approves the Authority as the permanent inter-tribal entity to enact ordinances and to act for the Bands.

(2) Prohibits revocation or repeal of ordinances in (1) or surrender of power of Authority to act except by Act of Congress.

(3) Requires approval of Secretary of any modification to any ordinance in (1) and only when the Secretary finds the modification will not interfere with the ability of the Authority to carry out its responsibilities.

(b)(1) Provides that the Authority will be treated as an Indian entity under Federal law with which the U.S. has a trust relationship.

(2) Authorizes Authority to enter into agreements necessary to implement this Act and the settlement agreement.

(3) Grants Authority discretion to invest and manage its funds.

(4) Requires all funds, other than those required to administer and operate the Authority, and to fulfill terms of agreements or obligations, to be used for economic development purposes. Prohibits use of funds for per capita payments.

(c) Recognizes the Authority as an Indian government for purposes of section 7871(a)(4) of the Internal Revenue Code of 1986.

Sec. 9. Authority to Execute Settlement Agreement.

Authorizes the Secretary of the Interior, the Attorney General, and the Bands to enter into the settlement agreement. Prohibits the Secretaries from delaying execution of the settlement agreement pending consideration of the availability of alternative sources of water or power pursuant to section 7.

Sec. 10. Authority of the Federal Energy Regulatory Commission and the Secretary of the Interior over Power Facilities and Government and Indian Lands.

(a) Any Federal power license for any part of the local water system (1) shall be subject to all terms, conditions and provisions of the settlement agreement, and (2) shall not affect the ability of the parties to fully implement and comply with the settlement agreement.

(b) Subject to (c) below, exclusively authorizes the Secretary of the Interior to lease, grant rights-of-way across or transfer title to any Indian land or other land over which he has authority, in connection with O&M, repair, or replacement of the facilities used to divert, convey and store the River water.

(c) Provides that disposition of trust land is subject to approval of the governing Indian Band and that an individual Indian owner or allottee is entitled to just compensation.

Sec. 11. Rules of Construction.

(a) The question of law with respect to whether reserved water may be used or sold off of any Indian Reservation to which reserved water rights may attach is unaffected by this Act.

(b) Clarifies that this Act does not authorize the sale or other disposition of power separately from the water described in 5(a)(1).

(c) Clarifies that the Act does not authorize the Federal Government to acquire water or power or any conveyance or transmission facility through the power of eminent domain, nor does the Act subject non-Federal facilities or water transported through those facilities to any Federal law to which they are not otherwise subject.

(d) Precludes construction of Act to imply anything with respect to the Indian Water Authority under any other law in the absence of this Act or if section 8 does not take effect.

Sec. 12. Any spending authority in bill is subject to advance appropriations.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 795, as amended, as evaluated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 13, 1987.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 795, the San Luis Rey Indian Water Rights Settlement Act.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

JAMES BLUM
(For Edward M. Gramlich, Acting Director.)

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 795.
2. Bill title: San Luis Rey Indian Water Rights Settlement Act.
3. Bill status: As ordered reported by the Senate Select Committee on Indian Affairs, November 5, 1987.
4. Bill purpose: S. 795 provides for the settlement of water rights claims of the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians in San Diego County, California. The bill establishes the San Luis Rey Indian Water Authority and sets forth its powers and duties.
5. Estimated cost to the federal government: S. 795 would result in a loss of receipts to the federal government, which would have the following direct spending effect on the budget.

[By fiscal years, in million of dollars]

	1988	1989	1990	1991	1992
Estimated budget authority	2.0	2.6	2.7	2.9	3.0
Estimated outlays	2.0	2.6	2.7	2.9	2.0

The costs of this bill fall within budget functions 270 and 300.

Basis of estimate: This estimate assumes that S. 795 will be enacted in January 1988. The costs to the federal government arise from forgone water and power receipts. The bill provides for reimbursement by the Bands of operation and maintenance costs, but not construction costs, incurred by the federal government in deliv-

ering water from the Central Valley Project. No additional construction is required to provide the water, but the construction component of the cost charged for delivery will be absorbed by the federal government. Based upon information provided by the Department of the Interior, CBO estimates that forgone water receipts will total about $50,000 annually.

The bill also requires the federal government to provide the power necessary to deliver the water from the Sacramento-San Joaquin Delta to the Indian Water Authority. This power would normally be sold as surplus power to the Pacific Gas and Electric Company, but would be made available to the tribe at the project use rate, which is below the rate charged for surplus power. Based upon information provided by the Western Area Power Administration, CBO estimates that provision of this power to the authority would result in forgone receipts of about $2 million in the remainder of 1988, and of nearly $3 million annually from 1989 to 1992.

6. Estimated cost to State and local governments: None.

7. Estimated comparison: None.

8. Previous CBO estimate: on April 22, 1987, CBO prepared a cost estimate for S. 795, as ordered reported by the Senate Select Committee on Indian Affairs, April 9, 1987. The differences between this estimate and that earlier submission reflect new assumptions regarding the enactment date and new information on forgone water receipts.

9. Estimate prepared by: Michael Sieverts.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 795, as amended, will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee received a legislative report on S. 2676 in the 99th Congress from the Department of Justice, and statements on S. 2676 from the Departments of Interior and Energy. These reports are reprinted in Senate Report 100–47. No executive communications on S. 795 have been received from the Administration in the 100th Congress. Senator Wilson has requested inclusion in this report of the following letter from the California Water Resources Control Board:

STATE OF CALIFORNIA,
STATE WATER RESOURCES CONTROL BOARD,
Sacramento, CA, November 27, 1987.

Hon. PETE WILSON,
U.S. Senate,
Washington, DC.

Re: S. 795: Views of California Water Resources Control Board on Section 5(a)(5), "Relationship to State Laws"

DEAR SENATOR WILSON: The California State Water Resources Control Board has been asked by your staff to state our views on a particular provision of S. 795, which would enact the "San Luis Rey Indian Water Rights Settlement Act". This measure would support a negotiated settlement of long-standing water rights litigation in San Diego County between Bands of the Mission Indians and non-Indian water rights claimants. The measure would accomplish this by making 22,700 acre-feet per annum of Central Valley Project water available to the Bands.

The particular language upon which our views are desired is found in Section 5(a)(5) and provides as follows:

"The water described in this subsection shall be subject to section 8 of the Act approved on June 17, 1902 (42 U.S.C. 383) (commonly known as the "Reclamation Act of 1902"), but nothing in this Act or any other law shall require compliance with the State laws governing changes in the places of use, purposes of use, or points of diversion of the water described in this subsection in the water rights permits for the Central Valley Project."

This language is intended to make clear that the United States Bureau of Reclamation, which holds the appropriative water right permits issued under California water right laws for the Central Valley Project, is not required to petition the California Water Board for approval of changes in place of use, purpose of use, or point of diversion from those presently authorized by the water right permits, for the limited purpose of serving water pursuant to the San Luis Rey Indian Water Rights Settlement Act. Such a petition and approval would normally be required by California water right law.

Notwithstanding this provision, the California Water Board does not oppose enactment of S. 795 under the unique circumstances presented by the problem which S. 795 is intended to solve. Our non-opposition has been and remains conditioned upon (1) the limited nature of the exemption from State approval, which extends only to place of use, purpose of use, and point of diversion changes; (2) the explanatory language contained in the Committee Report on S. 795, which recognizes the unique circumstances underlying S. 795; and (3) recognition and protection of the contract rights of users of Central Valley Project water and power. Following is further explanation of our viewss.

In 1978 the United States Supreme Court held in *State of California* v. *United States of America* (438 U.S. 645, 57 L.Ed.2d 1018, 98 S.Ct. 2985) that the Bureau of Reclamation, in its operation of water projects pursuant to the 1902 Reclamation Law, is required to observe the mandates of the water right laws of the states, unless application of such laws would conflict with clear Congres-

sional directives respecting the particular project. There has been little judicial guidance since the Court's 1978 decision on the question of the form with a clear Congressional directive must take in order to override state water laws.

One requirement of California water law is the appropriative water right permits issued by the State, such as that the permits held by the Bureau of Reclamation for operation of the Central Valley Project, specify the place where water appropriated pursuant to the permits will be used, the purposes of use, and the point or points of diversion. Any change in these specifications, including adding a new place of use, must be approved by the California Water Board before the change is implemented. The permits presently held by the Bureau of Reclamation for the Central Valley Project do not include authority to serve water for use within San Diego County. Accordingly, in the absence of a "clear Congressional directive" to the contrary, the Bureau of Reclamation would be required to obtain the approval of the California Water Board prior to serving water for such use.

When S. 2676 (the 1986 predecessor of S. 795) was introduced, we noted that a conflict in interpretation could well arise over the question whether this legislation if enacted did or did not constitute a "clear Congressional directive", within the meaning of *State of California* v. *United States of America,* that the Bureau of Reclamation was to serve water, in connection with settlement of Indian water rights litigation, without regard to California law requiring State approval of changes in water right permits. We concluded that this potential conflict in interpretation could itself lead to prolonged litigation of the question. Since the very purpose of S. 2676 was to bring an end to long-standing litigation over Indian water rights, we considered it to be unwise policy to replace that litigation with the potential for new litigation over a complex federal-state jurisdictional issue.

This view, together with some other California concerns over the language of S. 2676, was communicated to the Senate Select Committee on Indian Affairs by California Department of Water Resources Director David N. Kennedy by letters of August 11 and September 3, 1986. Mr. Kennedy stated that California would not oppose a limited preemption of state jurisdiction in the interest of bringing about the water rights settlement, and he suggested language to exempt the Bureau of Reclamation from having to obtain State approval of changes. This suggested language is substantially now found in Section 5(a)(5) of S. 795 and quoted above. In his letter of August 11, 1986, Mr. Kennedy spoke for the California Water Board and the Office of the California Attorney General, as well as for the California Department of Water Resources.

Additionally, during this period staff of the California Water Board and the California Department of Water Resources spoke with representatives of the settlement proponents regarding language that should appear in the Committee Report on S. 2676 recognizing the unique circumstances upon which California's non-opposition was predicated. Language was agreed upon and was included in the Report. Identical language is now included in the Committee Report on S. 795. We view the continued existence of

this legislative history material as a vital component of our position.

As I am sure you know, agencies of California state government having water management responsibilities would normally vigorously oppose federal legislation which would in any way preempt State authority over water rights. However, we recognize the preeminent federal trust responsibility and authority to protect the interests of the Indian Tribes, and our views on S. 795 are based on this recognition. To be very frank, I can think of no other circumstances in which we would not oppose preemptive legislation, and I again emphasize the importance of the limited nature of the exemption: the Bureau of Reclamation remains under a duty to observe all conditions of the Central Valley Project water right permits except those specifying place of use, purposes of use, and points of diversion of the water made available to the Bands by S. 795. If S. 795 is enacted including the present language of Section 5(a)(5), and thereafter the Bureau of Reclamation implements the water service provisions, I believe that the California Water Board would proceed to make appropriate amendments to the applicable Central Valley Project water right permits as a ministerial act. I would anticipate, however, that such an amendatory order would refer to the continuing duty of the Bureau of Reclamation to conform to all other permit conditions, including requirements respecting meeting water quality standards in the San Francisco Bay and Sacramento-San Joaquin Delta.

I appreciate the opportunity to provide these views to you. If you have any questions, please call me at (916) 445–3993 or have your staff call James T. Markle, Senior Staff Counsel, at (916) 322–3582.

Sincerely,

W. DON MAUGHAN,
Chairman.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of the rule XXVI of the Standing Rules of the Senate, the Committee notes that there will be no changes in existing law made by S. 795.

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